the House in 1913,[36] that at least the origin of the measure may be viewed as solely ascribable to the sentiment for national prohibition.[37] By the Amendment the power to legislate directly on liquors is conferred on Congress which previously had been limited to acting indirectly through the channel of its delegated powers. It is in connection with the mode of exercise of this newly conferred Congressional prerogative and its adjustment to the police power of the states under the "concurrent jurisdiction" created by the Amendment that the future problems of national liquor legislation will arise.

FRAUD PREVENTING THE INCEPTION OF CONTRACT.—In determining whether fraud renders a contract void or voidable, one must distinguish between two classes of fraud; the one which induces a person to assent to do a particular act which he would not have done but for the misrepresentation; and the other which induces him to believe that the act which he does is something different from what it actually is.[1] The former makes the contract voidable at the option of the defrauded party,[2] and is commonly known as fraud in the inducement.[3] The latter is often spoken of as fraud in the *factum*,[4] and prevents the inception of the contract, or, as it is generally said, makes the contract absolutely void.[5]

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[36]54 Cong. Rec. App. 734.

[37]It has been suggested that the Hobson Resolution, which was aimed at sales and left intact the personal liberty to drink, 55 Cong. Rec. 7822, was accepted by the liquor interests as a means whereby they hoped to continue manufacture for barter and to shift the blow of reform sentiment to the already doomed saloon. 54 Cong Rec. App. 733 *et seq.* However this may be, the resolution may be said to be solely the reflection of the growing strength of prohibitionism.

[1]"There are two kinds of fraud which differ essentially in their character; in the one the grantor is induced to convey his property by fraudulent representations as to the value, nature, or character of the consideration he receives for the conveyance. This is sometimes called fraud in the consideration. In the other case the grantor is deceived into the execution of the instrument of the contents of which he is ignorant. This is sometimes called fraud in the execution of the deed. The distinction between the two cases lies just here. It is elementary law that the assent of the parties is necessary to constitute a binding contract. In the first case the assent of the party though obtained by fraud is, nevertheless, obtained not only to the execution of the instrument, but to the contract which it evidences. In the second case there is procured only the signature to and the execution of the written instrument but not assent to the contract therein stated." Smith *v.* Ryan (1908) 191 N. Y. 452, 457, 84 N. E. 402; Walker *v.* Ebert (1871) 29 Wis. 194; 1 Page, Contracts §§ 63, 87, 131; Williston, Sales § 625.

[2]1 Page, *op. cit.* § 131.

[3]1 Page, *op. cit.* § 87.

[4]1 Page, *op. cit.* § 63.

[5]Foster *v.* Mackinnon (1869) L. R. 4 C. P. 704; Whitney *v.* Snider (N. Y. 1870) 2 Lansing 477; Jewelry Co. *v.* Darnell (1907) 135 Iowa 555, 113 N. W. 344; Freedly *v.* French (1891) 154 Mass. 339, 28 N. E. 273; Biddeford Nat'l. Bank *v.* Hill (1907) 102 Me. 346, 66 Atl. 721.

The rule was early stated in *Thoroughgood's Case*[6] that where a man signed a deed conveying land which he was fraudulently told was a release for arrears of rent only, such an instrument was not the man's deed. The courts have since universally held that an instrument secured under such circumstances or by the fraudulent substitution of one writing for another is absolutely void. Thus the substitution of a promissory note for a guaranty,[7] or a quit claim deed for a mortgage,[8] or a promissory note for a receipt,[9] or a negotiable instrument for a contract,[10] makes the instrument void in each case, and would prevent recovery against the defrauded party even by an innocent purchaser for value if the former was not negligent in signing.[11] Hence such a contract need not be rescinded, and the party seeking to avoid liability need not return what he has received thereunder.[12]

But there is no such unanimity among the courts in the following class of cases. For instance, the parties intend to or have entered into an agreement. One of them signs an instrument, relying upon the other's fraudulent assertion that the writing is in accordance with the oral understanding when, as a matter of fact, it is materially different. Or, one of the parties signs relying upon the other's fraudulent misreading of the writing. What are the legal consequences?

This question arose in the recent case of *Whipple* v. *Brown* (N. Y. Ct. of App. 1919) 121 N. E. 748. The plaintiff and the defendant's agent entered into an oral contract, in which the plaintiff agreed to purchase certain trees from the defendant. The oral agreement was then reduced to writing by the defendant's agent. As the plaintiff did not have his spectacles, he did not read the written instrument but signed it, relying upon the assurance of the agent that it was in accordance with their previous oral understanding. As a matter of fact the writing was not the same as the oral agreement, as it contained a limited warranty about which nothing had been said. The trees which the defendant delivered were worthless and the plaintiff sued for breach of the oral agreement. Defendant pleaded the written contract with its limited warranty. The plaintiff replied that it was void, having been secured by fraud. It was held, three judges dissenting, that the written agreement was void and that the plaintiff could recover.

Many courts regard such a case as analagous to *Foster* v. *Mackinnon,* and hold such an instrument absolutely void, as was held in the principal case.[13] Some of the courts in the western states, however,

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[6]"That although the party to whom the writing is made or other by his procurement doth not read the writing, but a stranger of his own head read it in other words than it in truth is, yet it shall not bind the party who delivereth it . . ." (1582) 1 Coke 444, 445.

[7]Foster *v.* Mackinnon, *supra,* footnote 5.

[8]Givan *v.* Masterson (1898) 152 Ind. 127, 51 N. E. 237.

[9]Biddeford National Bank *v.* Hill, *supra,* footnote 5.

[10]Walker *v.* Ebert, *supra,* footnote 1.

[11]Walker *v.* Ebert, *supra,* footnote 1; Taylor *v.* Atchison (1870) 54 Ill. 196.

[12]Indiana, *etc.* Ry. *v.* Fowler (1903) 201 Ill. 152, 66 N. E. 394; Pollock, Contracts (Wald 3rd ed.) 620; 1 Page, *op. cit.* § 63.

[13]Stacy *v.* Ross (1863) 27 Tex. 3; Gibbs *v.* Linabury (1871) 22 Mich. 479; Jewelry Co. *v.* Darnell, *supra,* footnote 5; 11 Harvard Law Rev. 472.

take the view that such a contract is entirely valid,[14] and they will not permit the defrauded party to introduce any evidence varying the writing.[15] The theory is that the person signing was negligent in failing to read the instrument.[16] But it is difficult to see how negligence should prevent one from pleading fraud when the action is between the original parties. Such a theory is inconsistent with the rule that the plaintiff's negligence does not bar recovery for a wilful tort.[17] The validity of the contract cannot be supported on the theory of estoppel, as some courts seem to say,[18] since the defrauding party should not be allowed to show that he relied upon a representation which his own wrong caused to be false. The only other reason given by the courts is public policy.[19] But why public policy should demand the protection of the defrauding as against the negligent party is hard to explain, for certainly it is better to encourage negligence than fraud.[20] Of course where the instrument gets into the hands of an

[14]Hawkins *v.* Hawkins (1875) 50 Cal. 558; Kimmell *v.* Skelly (1900) 130 Cal. 555, 62 Pac. 1067; Farlow *v.* Chambers (1907) 21 S. D. 128, 110 N. W. 94. Some courts, however, divide these cases in two or more groups as seen from the following. "Our courts have held from the beginning that if a person was unable to read or write, either from the fact that he never learned or his eyesight has failed, and on account thereof, was unable to protect himself, and the opposite party took advantage of his infirmity and procured a contract from him by misreading it or substituting one contract for another, the contract is void. On the other hand, our courts hold when a person in full possession of his faculties signed a contract without reading it, but relying upon the statement of the other contracting party as to what it contained, the contract is valid, notwithstanding the other party misstated the contents thereof." Birdsall *v.* Coon (1911) 157 Mo. App. 439, 449, 139 S. W. 243. On principle, there should be no distinction between the cases, since in neither case does the party intend to sign the particular instrument.

[15]White Sewing Machine Co. *v.* McCarty Furniture Co. (Okla. 1916) 160 Pac. 495.

[16]White Sewing Machine Co. *v.* McCarty Furniture Co., *supra,* footnote 15. "The policy of the law is fixed to the effect that he who will not reasonably guard his own interest when he has reasonable opportunity to do so, and there is no circumstance reasonably calculated to deter him from improving such opportunity, must take the consequences". Standard Mfg. Co. *v.* Slot (1904) 121 Wis. 14, 24, 98 N. W. 923.

[17]"But where one sues another for a positive, wilful, wrong or fraud negligence by which the party injured exposed himself to the wrong or fraud will not bar relief. If the rule were otherwise the unwary and confiding, who need the protection of the law the most, would be left a prey to the fraudulent and artful practices of evil doers." Albany City Savings Inst. *v.* Burdick (1881) 87 N. Y. 40, 49; 1 Page, *op. cit.* § 64.

[18]Shores-Mueller Co. *v.* Lonning (1913) 159 Iowa 95, 140 N. W. 197.

[19]"As a written contract is the highest evidence of the terms of the agreement between the parties to it, it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public which, as a matter of public policy, treats the written contract as a conclusive answer to the question, What was the agreement?" Farlow *v.* Chambers, *supra,* footnote 14 at p. 132 *et seq.*

[20]Wilcox *v.* American Tel. & Tel. Co. (1903) 176 N. Y. 115, 68 N. E. 153; Strauss & Co. *v.* Welsbach Gas Lamp Co. (1903) 42 Misc. 184, 85 N. Y. Supp. 367; The Warder, Bushnell & Glessner Co. *v.* Whitish (1890)

innocent third party then both the doctrines of estoppel and of public policy might prevent the negligent party from setting up the fraud.[21] Thus, it would see that the cases which regard the contract as valid cannot be supported.[22]

An intermediate position, suggested for the most part in *dicta,* is that such a contract is voidable.[23] However, it is impossible to draw a distinction between such a case and a case like *Foster* v. *Mackinnon* without getting into difficulties. The reason for the decision in the latter also exists in the former case.[24] The difference is only one in degree. It is true that in *Foster* v. *Mackinnon* the defrauded party had no intention to sign any instrument of the kind he did sign while in the former case he did intend to enter into a contract of a similar nature. But that is a distinction without a difference, since in neither case did the person intend to sign the particular instrument upon which he placed his signature. Hence, on principle, it would seem that where a party signs a contract relying upon the other's fraudulent misreading, or assertion that the writing is in accordance with their oral understanding, the contract is void.[25]

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77 Wis. 430, 46 N. W. 540; Albany City Saving Inst. *v.* Burdick, *supra,* footnote 17.

[21]Pollock, *op. cit.* 585, n. 30. This is especially true in the case of negotiable instruments. See Foster *v.* Mackinnon, *supra,* footnote 5. But in the case of contracts, since the assignee takes subject to all equities between the immediate contracting parties, Norton, Bills & Notes (4th ed.) §§ 2-7; 12 Columbia Law Rev. 460, he should not be able to recover in those jurisdictions where negligence on the part of the defrauded party does not validate the contract as between the immediate parties.

[22]Of course, if the party signing is so negligent that it might be inferred that he signed in spite of and not in reliance upon the fraud, he might be prevented from setting it up, since he will be regarded to have assented to the writing regardless of its terms. See Lotter *v.* Knospe (1911) 144 Wis. 426, 129 N. W. 614, 1 Page, *op. cit.* § 117 *et seq.*

[23]*Cf.* Conn *v.* Hagan (1900) 93 Tex. 334, 55 S. W. 323; Pioneer Savings & Loan Co. *v.* Baumann (Tex. Ct. Civ. App. 1900) 58 S. W. 49; Williams *v.* Hamilton (1898) 104 Iowa 423, 73 N. W. 1029; Hansford *v.* Freeman (1896) 99 Ga. 376, 27 S. E. 706; see Bostwick *v.* Mutual Life Ins. Co. (1903) 116 Wis. 392, 89 N. W. 538; Strauss & Co. *v.* Welsbach Gas Lamp Co., *supra,* footnote 20; Linington *v.* Strong (1883) 107 Ill. 295. "It is a general rule that where a written instrument fails to conform to the agreement between the parties in consequence of the mutual mistakes of the parties however induced, or the mistake of one party and the fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties." Albany City Savings Inst. *v.* Burdick, *supra,* footnote 17, at p. 47. This case held that a deed which failed to contain the original agreement could be reformed. Hence, it had to go on the basis that the deed was voidable and not void, for a void instrument cannot be reformed. The same was true in Welles *v.* Yates (1871) 44 N. Y. 525. These cases probably can be reconciled with the principal case on the the ground that the defrauded party had performed and had received benefits under the transaction, which he intended to receive. The fraud in the former case consisted in imposing an extra liability on the defrauded party. Under such circumstances the court of equity exercised a proper function in striking out the objectionable provision in the deed.

[24]"One cannot be made to stand on a contract he never made." Cummings *v.* Ross (1891) 90 Cal. 68, 71, 27 Pac. 62.

[25]Biddeford Nat'l. Bank *v.* Hill, *supra,* footnote 5.

The question whether a contract is void or voidable, however, is in many cases of no consequence. The only time that the distinction becomes material is where the defrauded party has been deemed to have waived the fraud by his laches in bringing the action,[26] or where the instrument has passed into the hands of a bona fide purchaser for value in case of negotiable instruments,[27] or where he seeks reformation or specific performance,[28] or where the oral contract is within the statute of frauds, and, hence, the party would have to rely upon the written agreement. In many cases, however, the courts go into a discussion of the subject when they could reach the same result whether the contract is void or voidable. Such are cases where the plaintiff sues the defendant on a written contract and the defendant pleads fraud,[29] since the defendant could set up the fraud even though the agreement was only voidable,[30] or where one of the parties to an action sets up a release secured by fraud.[31] If the plaintiff has tendered back what he has received, it is immaterial whether the agreement is void or merely voidable, as a defrauded party can rescind a voidable instrument and sue on the original claim.[32] Thus, it would appear that it was not necessary for the court in the principal case to determine whether the written instrument was void or only voidable. If the former, then it never had any existence and the plaintiff could proceed on the oral agreement; if the latter, the plaintiff could rescind the written instrument,[33] and then proceed on the oral agreement.[34]

CONTROL OF RESALE PRICES BY REFUSAL TO SELL TO PRICE CUTTERS. —The prohibition against the fixing of the resale price of chattels has received a sharp limitation in two recent federal cases,—the one arising under an indictment,[1] the other being a civil cause.[2] The alleged wrong in both cases was a combination between the manufacturer and retailers whereby the former sold only to those retailers who resold at suggested prices and maintained a system by which he was informed of the names of price cutters. In both cases it was held

[26]Jewelry Co. *v.* Darnell, *supra,* footnote 5.

[27]Gibbs *v.* Linabury, *supra,* footnote 13.

[28]Welles *v.* Yates, *supra,* footnote 23; Maher *v.* Hibernia Ins. Co. (1876) 67 N. Y. 283.

[29]See Alexander *v.* Brogley (1898) 62 N. J. L. 584, 41 Atl. 691; Beck & Pauli Lithographing Co. *v.* Houppert & Worcester (1894) 104 Ala. 503, 16 So. 522; Kranich *v.* Sherwood (1892) 92 Mich. 397, 52 N. W. 741.

[30]1 Page, *op. cit.* § 136.

[31]Chicago, R. I. & P. Ry. *v.* Lewis (1884) 109 Ill. 120; Railroad Co. *v.* Doyle (1877) 18 Kan. 58; Smith *v.* Holyoke (1873) 112 Mass. 517.

[32]O'Donnell *v.* Clinton (1888) 145 Mass. 461, 14 N. E. 747; Page, *op. cit.* § 134.

[33]See Vail *v.* Reynolds (1890) 118 N. Y. 297, 23 N. E. 301; Zunker *v.* Kuehn (1902) 113 Wis. 421, 88 N. W. 605.

[34]See the concurring opinion of Mr. Justice Crane in the principal case p. 753; *cf.* Hickman *v.* Haynes (1875) L. R. 10 C. P. 598. The doctrine of merger ought not to apply, since a writing which is invalidated should not destroy a previous oral agreement.

[1]United States *v.* Colgate & Co. (D. C., E. D., Va. 1918) 253 Fed. 522.

[2]Baran *v.* Goodyear Tire & Rubber Co. (D. C., S. D., N. Y. 1919) 60 N. Y. L. J. 1513.